Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SINCLAIR OIL CORPORATION,
a Wyoming corporation,
Petitioner,

vs.

COUNTY OF SANTA BARBARA,
a Political Subdivision of the State of California;
SANTA BARBARA COUNTY BOARD OF SUPERVISORS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where diversity of citizenship exists, may an out-of-state plaintiff be barred from the federal courts and ordered to try his cause in state courts, 28 U.S.C. § 1332 notwithstanding? This issue is related to one now pending on the merits before this Court in *City of Chicago v. International College of Surgeons*, No. 96-910. Moreover, the Ninth Circuit's decision of this issue in this case conflicts directly with the Tenth Circuit's recent decision in *SK Finance SA v. La Plata County Bd. of Com'rs*, 126 F.3d 1272, 1276 (10th Cir. 1997).

2. May the *Pullman* abstention doctrine be used to bar out-of-state plaintiffs from exercising their diversity right to try state law claims in the neutral federal forum, and force them to try their cases in the state courts, 28 U.S.C. § 1332 notwithstanding?

3. When government land use regulations cannot be applied to the plaintiff's property in a constitutional manner — because any application of their plain and mandatory language will violate *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and result in a taking of private property for public use without the payment of just compensation — is the aggrieved land owner's facial challenge to the regulations' constitutionality ripe for judicial review?

4. Where a land owner is substantially deprived of property without substantive due process of law, but the deprivation falls short of a total extinguishment of property rights cognizable under the Fifth Amendment's Taking Clause, is such a case justiciable under the Fourteenth Amendment's Due Process Clause?

PARTIES TO THE PROCEEDING
And Rule 29.6 Statement

The Plaintiff is Sinclair Oil Corporation, a Wyoming corporation.

Sinclair has neither a parent nor subsidiary corporations.

The Defendants are the County of Santa Barbara, a political subdivision of the State of California, and the Santa Barbara County Board of Supervisors, the County's governing body.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sinclair Oil Company (Sinclair) respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion was filed on September 16, 1996 and is published at 96 F.3d 401 (9th Cir. 1996). (App. A.) Sinclair's timely Petition for Rehearing was denied more than a year later, on October 31, 1997. (App. B.) The District Court's orders were not published. The District Court's order dismissing the complaint is App. C, and the District Court's order denying reconsideration is App. D. Pertinent excerpts from local laws are reproduced in App. E.

JURISDICTION

This case involves the facially unconstitutional regulation of 265 acres of undeveloped coastal land in the County of Santa Barbara, California, which the Respondent County wants to acquire but, in the interim, has prevented from being used for any economically beneficial or productive purpose.

Petitioner Sinclair, a Wyoming corporation, filed suit seeking redress, and in so doing, exercised its right under 28 U.S.C. § 1332 to invoke the diversity jurisdiction of the District Court because the defendant is a California entity. Sinclair's complaint sought relief under the California Constitution and laws, as well as

the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, because the governmental action had taken its property without compensation and deprived it of its property without due process of law.

The District Court dismissed the case. (App. C.) The Court of Appeals *de facto* affirmed, although it reversed on one point. (App. A.) Sinclair timely filed its Petition for Rehearing. Ten months later, the Court of Appeals asked the County to respond to the Petition. Thereafter, on October 31, 1997, the Petition for Rehearing was denied. (App. B.)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

California Constitution, Art. I, § 19:

> "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner."

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Pertinent portions of the Goleta Community Plan (i.e., the controlling County law) are reproduced in App. E.

STATEMENT OF THE CASE

A

The Central Facts

Sinclair, a Wyoming corporation, brought this action in U.S. District Court under that court's diversity jurisdiction (28 U.S.C. § 1332), as well as its federal question jurisdiction (28 U.S.C. § 1331). Sinclair did so in reliance on its clear right under 28 U.S.C. § 1332, and also because it believed it could not obtain a fair hearing on its complaint against the County's policies in California's courts, since California's courts are notoriously "anti-development" and provide property owners with little hope of fair treatment.[1] In other words, this is the

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[1] This is not an advocate's hyperbole. Scholars are nearly uniform in concluding that California's judiciary is unduly harsh on property owners in land use cases. (1 Williams, American Land Planning Law, § 6.03 at 115-116 [1974]; 5 Williams, American Land Planning Law, § 151.02 at 276, § 156.07 at 357 [rev. ed. 1985]; Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6, 7 [July 1985]; Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 The Urban Lawyer 279, 287 [1984]; Fischel, Regulatory Takings: Law, Economics and Politics [Harvard Univ. Press 1995].) Even pro-government advocates recognize this. (Babcock & Siemon, The Zoning Game Revisited 251, 253, 257, 293 [1985].) A recent survey of leading scholars confirmed it:

> "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts." (Coyle, Property Rights and the Constitution 11 [State Univ. of N.Y. Press 1993].)

very situation Congress meant to guard against when it enacted 28 U.S.C. § 1332.

Sinclair owns 265 acres of undeveloped land on the coast in Santa Barbara County. The land, known locally as More Mesa, consists of six contiguous parcels extending for a mile along the beach. Decades of farming drove most native vegetation out long ago. As the area surrounding the property has been developed for residential use, Sinclair's neighbors have come to look on this property as their own private recreation area. They want to keep it that way, regardless of Sinclair's rights. (Complaint, ¶¶ 2-9.)

When Sinclair purchased this property, the surrounding land was either developed or in the process of development, and the Sinclair property was itself planned and zoned for development of 300 homes. The site was on the coast (containing its own beach and bluffs overlooking the ocean) and close to the 101 freeway, the State's primary coastal artery. The County had long planned for direct access from Sinclair's property to the freeway when the property was developed. A major access road dead-ended at the eastern and western ends of the Sinclair property. The County's general plan provided that these stubs would be connected across the Sinclair property, and a portion of that connection in the middle of the Sinclair property had already been dedicated to the County, and accepted, in anticipation of the road's completion. (Complaint, ¶ 90.) Sinclair's purchase thus embodies the distinct, investment-backed expectations of being able to put its land to productive uses, the same as everyone else in the area.

The County has since decided that it would like to acquire the Sinclair property. But it doesn't want to pay for it. (Complaint, ¶¶ 17-18.)

Rather than buy the property, the County has resorted to misuse of its land use regulatory powers. While taxing Sinclair on its land, the County has prevented Sinclair from using the property in any way that is meaningful for a private property owner. As shown in the complaint:

(1) By its own fiat, the County has designated five of the six Sinclair parcels (approximately 85% of the land) as "environmentally sensitive habitat" without evidence to support that designation. In fact, the subject property is ordinary farm land. (Complaint, ¶¶ 21-23.)[2] The effect of the "environmentally sensitive habitat" designation under California law is to preclude all use of the area. (*Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 15 Cal.Rptr.2d 779 [1993].) Sinclair has thus been conscripted as a private keeper of de facto public "open space" land.

(2) The County has precluded virtually all vehicular access to the property (by removing from its general plan the connection to the 101 freeway, along with other local access points), and now insists that development must also be virtually eliminated because the property no longer has adequate access. (Complaint, ¶¶ 38-39.)[3]

(3) Not content with all that, the County's plan for the area further requires, as a condition of *any* development Sinclair might want to make on the theoretically

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[2] Farming has never been an economically productive use of this land. Now that it is surrounded by residential development, its use for agriculture is even less feasible.

[3] This is a disability self-inflicted by the County. Plainly, if the County had not eliminated the freeway access, there would be no access problem. Such deprivation of access is wrongful under California law. (See *Jones v. People ex rel. Dept. of Transp.*, 22 Cal.3d 144, 583 P.2d 165 [1978].)

developable remnant of its property, the "donation" to the County of "*at least*" 1/5 of the entire 265 acres (specifically including all of the beach and the bluff overlooking it). (Complaint, ¶ 40; App. E-5.) This exaction demand is illegal because it lacks any essential nexus to any burdens which any proposed development will place on the public (*Nollan v. California Coastal Commn.*, 483 U.S. 825 [1987]), and *a fortiori* it precludes any ability to discern if the exaction bears a "rough proportionality" to those burdens (*Dolan v. City of Tigard*, 512 U.S. 374, 129 L.Ed.2d 304, 320 [1994]). The County has certainly not met its burden of so demonstrating (*Dolan*, 129 L.Ed.2d at 320), and here, no such nexus exists. The County's blanket demand for the same "gift," regardless of the nature of any proposed development, and before the impact of any conjectured development can even be ascertained, is unconstitutional on its face.[4]

(4) The County further rationalized restricting Sinclair's use of its property by its vague assertion that there are at least five "known" archaeological sites on the Sinclair property. However, the County refused to disclose the basis for this conclusion *or even the location of the supposed sites* on the spurious ground that it would lead to their despoliation. "Trust us," said the County in effect; the sites are there and their locations

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[4] As this Court has recognized, it is impossible to make a rational judgment whether any exaction is proper until one knows what the proposed development is, what its impact is, and what sort of exaction would be "roughly proportional" under *Dolan*. But the County instead demands "at least" 1/5 of Sinclair's land "up front," even though neither it nor anyone else is able to say at this time that such an exaction meets the permissible criteria of *Nollan* and *Dolan*. Put another way, the County thus seeks to put its extortionate cart before the constitutional horse.

preclude almost all development. Thus, to "protect" these five unsubstantiated sites, virtually the entire 265 acres was restricted to lie fallow. (Complaint, ¶¶ 41-44.)

(5) The County has determined that, these restrictions aside, *any* development of Sinclair's 265-acre property must be restricted to a 40-acre remnant at an inland corner of one of the property's six parcels, thus de facto reducing Sinclair's useable land ownership by some 85%. That 40-acre corner is the least useful, the least profitable, the least attractive, the least desirable for development, and (now) the least accessible. Even if it could be developed to the maximum ostensibly permitted by the County, this 40-acre usage would not be an economically beneficial or productive use of Sinclair's 265-acre property. Given the conditions and restrictions the County has placed on development (see App. E), the cost of the minimally-permitted development will exceed Sinclair's ability to recoup its investment,[5] much less obtain a reasonable return on it.[6]

The County's desire to own Sinclair's property is no secret. It has been publicly stated for years. The severe and arbitrary restrictions that are the subject of this

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[5] In addition to the massive automatic "dedication" of at least 20% of the property and the prohibition on using another 65%, the County has demanded that the few homes to be permitted on the remainder must share that space with additional "public amenities" to be provided by Sinclair at Sinclair's expense, including: parking for 300 cars, public restrooms, picnic areas, bike racks, trails, and public access roads. (App. E6-E7.) Compare *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) (regulation requiring private property owners to open their land to public is a taking).

[6] See *Nectow v. Cambridge*, 277 U.S. 183, 187 (1928): land use regulation must allow the owner a "practical use" that allows for an "adequate return on the amount of any investment for the development of the property" to pass constitutional muster.

litigation were imposed by the County as a cheap — albeit unconstitutional — alternative to condemnation and purchase.

B

The Legal Proceedings

Sinclair filed suit in U.S. District Court under that Court's diversity jurisdiction. (28 U.S.C. § 1332.) Sinclair's first cause of action sought to have the District Court (exercising the powers of a California court under its diversity jurisdiction) to issue a writ of mandate (the proper California procedure)[7] to invalidate the offending portions of the County's new plan. The remainder of the complaint raised constitutional questions under both state and federal law regarding takings without just compensation and deprivation of property without due process of law.

In other words, Sinclair alleged a taking of its property and, in the alternative — if the impact of the County's overreaching regulations failed to rise to the level of a taking — a substantial deprivation of valuable property arbitrarily and without due process of law.

The District Court's two-paragraph dismissal order summarily concluded that the takings and due process causes of action were not ripe for adjudication and that the All Writs Act did not confer jurisdiction over the

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[7] California procedure requires that a petition for a writ of mandate precede an action sounding in inverse condemnation, although the two can be consolidated, as Sinclair did here. (*Hensler v. City of Glendale*, 8 Cal.4th 1, 14, 876 P.2d 1043 [1994].)

first cause of action. (App. C.)[8]

Sinclair sought reconsideration because the District Court's order failed to consider diversity jurisdiction. The exercise of diversity jurisdiction would plainly eliminate any "ripeness" problem caused by not suing in state court first, because the District Court would then be exercising jurisdiction over state law claims in the first instance in the manner of a state court. As this Court put it: ". . . a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . . ." (*Guaranty Trust Co. v. York*, 326 U.S. 99, 108 [1945].)

The District Court denied reconsideration. Its order said that an unripe complaint cannot serve as the basis for jurisdiction and diversity of citizenship cannot confer jurisdiction which does not otherwise exist. (App. D.) With respect, that order appears to reach the following anomalous result:

- for a constitutional land use case to be "ripe" for litigation in federal court, resort must first be had to the state courts (see *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 [1985]);
- a plaintiff in a diversity action may file suit in federal court in the first instance, seeking relief under state law, as if in state court (28 U.S.C. § 1332);

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[8] The District Court misunderstood the first cause of action. Sinclair sought its writ under California law pursuant to the court's diversity jurisdiction, not under 42 U.S.C. § 1651 in aid of other federal jurisdiction.

- Sinclair sought relief under state law in federal court in the first instance (28 U.S.C. § 1332);
- but, said the District Court, even though Sinclair invoked federal *diversity* jurisdiction to try its state claims in federal court, those claims could not be "ripe" for consideration until after Sinclair — an out-of-state plaintiff — first tried them in state court;
- thus, to gain its statutorily provided access to *federal* court in the first instance, a *diversity* plaintiff must first sue in *state* court — the very forum that the diversity jurisdiction statute permits it to opt out of.

Following that unfortunate logic, 28 U.S.C. § 1332 is stultified. Under this "rule," diversity jurisdiction can *never* exist in land use cases, even if they involve gross constitutional violations. That cannot be an appropriate way to treat a clear Congressional enactment. As this Court eloquently put it:

> "Statutes . . . are not inert exercises in literary composition. They are instruments of government . . . ." (*U.S. v. Shirey*, 359 U.S. 255, 260 [1959].)

On appeal, although the Ninth Circuit nominally reversed part of the District Court's decision, it *de facto* affirmed. (App. A.) The Ninth Circuit held that, in one regard, the District Court erred: its ruling that Sinclair's attack on the County's ordinance as failing to substantially advance a legitimate state interest (see *Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]) was not ripe

for adjudication was erroneous. However, the Circuit Court then held that the federal courts should abstain from exercising even diversity jurisdiction, and remanded Sinclair to the tender mercies of state courts, in spite of Sinclair's clear 28 U.S.C. § 1332 entitlement to invoke diversity jurisdiction of the *federal* courts in the first instance. Thus, the one portion of the District Court judgment that was "reversed in part," was reversed in name only. The abstention order made the reversal a precise functional equivalent of the ripeness dismissal. In either case, Sinclair was out of federal court where it had a clear right to be under 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

Having recently decided *Suitum v. Tahoe Reg. Plan. Agency*, __ U.S. __, 137 L.Ed.2d 980 (1997), this Court has had current exposure to some of the problems that bedevil property owners in land use/takings cases because of excessive application of the doctrine of "ripeness."

This case goes *Suitum* one better because of its diversity jurisdiction implications.

In *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a property owner's claim that government regulation had taken property without compensation was not ripe for litigation in federal court until the property owner had sought (and been denied) relief in state court. But *Williamson County* was not a diversity case. A property owner who is a citizen of a different state than that of the governmental regulator is entitled to invoke the federal courts' diversity jurisdiction (28 U.S.C. § 1332) to try state law

issues in federal court, which then performs the function of a state court. (See *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 190 [1959]; 19 Wright, Miller & Cooper, Federal Practice and Procedure § 4501 [2d ed. 1996].)

When Sinclair sought to proceed in that manner here, the District Court dismissed the case as not ripe because it thought that, under *Williamson County*, Sinclair had to sue first in state court in spite of its diversity status.

The Ninth Circuit compounded the problem by first holding at least part of the case ripe but nonetheless ordering the District Court to abstain from exercising its jurisdiction. (See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 [1941].)

With respect, that result does violence to settled concepts of federal jurisdiction that require courts to decide cases when their jurisdiction is properly invoked (e.g., *Bell v. Hood*, 327 U.S. 678, 681-682 [1946]), and to use the abstention concept sparingly, and not as a simple means to "escape from [the] duty . . ." of adjudication (*Zwickler v. Koota*, 389 U.S. 241, 248 [1967]). The holding below cannot be right. The purpose of diversity jurisdiction is to enable out-of-state plaintiffs to obtain a more neutral forum to litigate their disputes, free of regional concerns that may dominate state court proceedings. That truism has been observed and applied by many of the giants who have graced this Court, from Chief Justice Marshall (*Bank of the United States v. Deveaux*, 9 U.S. [5 Cr.] 61, 87 [1809]) to Justice Story (*Martin v. Hunter's Lessee*, 14 U.S. [1 Wheat.] 304, 347 [1816]) to Justice Brandeis (*Erie R. Co. v. Tomkins*, 304 U.S. 64, 74 [1938]) to Justice Frankfurter (*Guaranty Trust Co. v. York* 326 U.S. 99, 111 [1945]).

Beyond the diversity issue, the Ninth Circuit has created an anomalous situation in which serious

constitutional violations may *never* be heard. In an evident over-reading of *Graham v. Connor*, 490 U.S. 386 (1989), that Court has concluded that *all* constitutional claims dealing with property must either be pursued under the Takings Clause of the Fifth Amendment or they cannot be pursued at all. The error and unfairness of that simplistic and overbroad doctrine should be apparent. Not all impacts on property — even unconstitutional ones — rise to the level of takings. But under the decision here (which applied the *en banc* decision in *Armendariz v. Penman*, 75 F.3d 1311 [9th Cir. 1994]), if its not a taking, its constitutional deficiencies cannot be adjudicated at all.[9]

But consider the facts here. One of the things the County did was to eliminate virtually all access to Sinclair's property and then say there could be virtually no development because the property had no access. Assuming *arguendo* that a court could conclude that the impact was not so severe as to be a taking (because sufficient residual uses of the property could be conjured up), the high-handed arbitrariness of the treatment still presents a substantive due process issue for trial. Whether or not Sinclair's property has been *de facto*

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[9] As an *en banc* decision, *Armendariz* authoritatively declares the law of the Ninth Circuit. Because the plaintiffs there were permitted other avenues of relief, they did not seek certiorari. Thus, this Court has never had the opportunity to review *Armendariz*. The application of its rule here demonstrates that the Ninth Circuit means to prevent any consideration of claims that government actions have arbitrarily interfered with property owners' rights if the severity of the impact (or the nature of the governmental action) does not rise to the drastic level of a constitutional taking. If that is what this Court intended in *Graham*, it ought to say so directly. If not, then the Ninth Circuit's error ought to be corrected, lest it cause further confusion and injustice, and lest it encourage further arbitrary actions by local regulators.

taken, Sinclair has suffered a massive deprivation of its property rights by means that are simply arbitrary. Yet the opinion below precludes any relief in federal court, supposedly as a matter of law, without any inquiry into the facts, no matter how egregious, and in outright defiance of 28 U.S.C. § 1332.

In the last decade, this Court has made progress in bringing some sense to the regulatory taking field. *Nollan* and *Dolan* combined to place rational limitations on the ability of government permit-issuers to exact property dedications as a quid pro quo for making economically rational use of private land. Here, however, the County has openly thumbed its corporate nose at this Court's decisions in *Nollan* and *Dolan*, by demanding an up-front "gift" of "at least" 1/5 of Sinclair's property as a condition to *any* kind of development Sinclair might seek — regardless of its scope and regardless of its impact (or lack thereof) on the public. The County further declared that the land so exacted (or, more accurately, extorted) may just be given away by it to another private party, with no safeguards or standards. (App. E-5.) And the Ninth Circuit wouldn't adjudicate the legality of that plain constitutional violation. Apparently, this Court's *Nollan/Dolan/Suitum* message needs reinforcement.

Serious questions still remain in the takings field. The jurisdictional, ripeness, abstention and due process issues presented by this Petition present appropriate next steps in the development of the law.

ABSTENTION IN A DIVERSITY CASE IS A CONTRADICTION IN TERMS

Little can be added to the headline. The whole point of diversity jurisdiction is to permit nonresidents to sue forum state residents in a neutral, federal forum.

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, *at their option*, to assert their rights in the federal rather than in the state courts." (*Meredith v. Winter Haven*, 320 U.S. 228, 234 [1943]; emphasis added.)

See also *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968) ("to protect [the out-of-towner] from parochialism"); *Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 330, n.1 (5th Cir. 1982) (diversity jurisdiction permits plaintiff "to avoid the partisanship" of state courts); *Baltimore Bank, etc. v. Farmers Cheese Coop.*, 583 F.2d 104, 112 (3d Cir. 1978) (purpose of diversity jurisdiction was to provide "neutral" forum for outsiders).

That self-evident proposition applies with even more force when the forum state defendant is the County that operates the local courthouse.[10] That is why this Wyoming citizen exercised what this Court, in *Meredith*,

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[10] Even California law recognizes that there may be unwholesome factors implicated in the close relationship between local county officials and local courts that work to the disadvantage of an "outsider." (*Garrett v. Superior Court*, 11 Cal.3d 245, 248, 520 P.2d 968 [1974].)

called its lawful "option" to have its case decided in federal, not state, court.

Yet the Ninth Circuit has simply ignored that general body of diversity law and insists that Sinclair try its suit in state court, thus stripping Sinclair (as well as future litigants in a similar predicament) of its rights under 28 U.S.C. § 1332.

This Court and other Courts of Appeals have repeatedly acknowledged the purpose and utility of diversity jurisdiction and the right of diverse plaintiffs to invoke its protection against parochialism. If that protection is to be extended to property owners in the western third of the United States, the decision below calls for review by this Court.

THIS COURT'S REVIEW IS FURTHER NEEDED BECAUSE THIS NINTH CIRCUIT DECISION REFUSING TO ENFORCE DIVERSITY JURISDICTION CONFLICTS DIRECTLY WITH A RECENT TENTH CIRCUIT DECISION

Since the Ninth Circuit's decision was filed, the Tenth Circuit has rendered a directly conflicting holding: *SK Finance SA v. La Plata County, Bd. of Com'rs*, 126 F.3d 1272 (10th Cir. 1997). There, the Court framed the question before it as follows:

> "Can a federal district court with diversity jurisdiction consider an inverse condemnation claim arising from the Colorado Constitution . . . ?" (126 F.3d at 1276.)

The Tenth Circuit answered in the affirmative and proceeded to deal with the merits of the question. In doing so, it relied on this Court's decisions in *Searl v. School Dist. No. 2*, 124 U.S. 197 (1888) and *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905). Those were removal cases.[11] In *Searl*, a state condemnation action had been removed to federal court by the diverse defendant. To be removable, the case had to be one that could have been brought directly in federal court. As that direct condemnation case could thus have been brought in federal court under the diversity jurisdiction, it followed that the same was true of SK Finance's inverse condemnation case.

So here. The fact that these two diametrically opposed holdings on this central point of federal jurisdiction and procedure are simultaneously extant can do nothing but cause confusion in the years ahead. The prudent course would seem to be for this Court to grant certiorari here and settle this head-on intercircuit conflict one way or the other.

If there is any kind of case in which abstention from the exercise of jurisdiction ought *not* be exercised, it would be a diversity case, because 28 U.S.C. § 1332 provides an independent jurisdictional basis for the federal courts. If, as the opinion below concedes (App. A-9), the District Court erred in finding at least part of this case unripe, then the ripe matter is to be decided in the neutral federal forum as envisioned by this Court

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[11] Questions about removal jurisdiction are now pending before this Court in *City of Chicago v. International College of Surgeons*, No. 96-910. As the cases show, there is a direct relationship between removal and diversity jurisdiction. Along with *City of Chicago*, this case thus presents the Court with a unique opportunity to illuminate the doctrine that governs state/federal court allocation of judicial business in a way that will obviate the need for future litigation.

from its earliest days. As eloquently summarized by Mr. Justice Frankfurter:

> "Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. [Citation.]" (*Guaranty Trust Co. v. York* 326 U.S. 99, 111 [1945])

There is no reason why that sensible and fair doctrine should not be operative west of the Rocky Mountains, as it is in the rest of the country.

THERE IS NO REASON FOR ROUTINE *PULLMAN* ABSTENTION IN LAND USE CASES

In ordering abstention here, the Ninth Circuit employed its generalized feeling that federal courts ought to stay out of land use cases when at all possible. Here is how the court expressed that:

> "[T]his Court has consistently held that 'land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention.' [Citation.]" (App. A-14.)

The idea that "sensitive area[s] of social policy" have anything to do with *Pullman* abstention — something not mentioned in this Court's *Pullman* decision itself —

seems to be a Ninth Circuit invention. Others don't consider it at all. (E.g., *Palmer v. Jackson*, 617 F.2d 424, 428 [5th Cir. 1980].) Legitimate invocation of the *Pullman* doctrine depends on whether there are specific unresolved issues of *state* law that, if resolved in the plaintiff's favor, will moot the federal question. But the Ninth Circuit instead deems an entire field of law (i.e., land use regulation) to be presumptively "unresolved" and off limits although it plainly is not.

Decades ago, this Court explained that even a state's power of eminent domain (which is central to regulatory taking cases like this) was not so sacred that abstention would be routinely warranted:

> "It is suggested, however, that abstention is justified on grounds of avoiding the hazard of friction in federal-state relations any time a District Court is called on to adjudicate a case involving the State's power of eminent domain, even though, as in this case, the District Court would simply be applying state law in the same manner as would a state court. *But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, [citation], its power to regulate intrastate trucking rates, [citation], a city's power to issue certain bonds without a referendum,*

> *[citation], and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law.*" (*County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 192 [1959]; emphasis added.)

Here, as in *Frank Mashuda*, the legal issues are not unsettled; it is the application of settled legal precepts to facts that is required. For example, the law of exactions is clearly laid out in *Nollan* and *Dolan* and followed in California (See *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 859, 911 P.2d 429 [1996]). All the trial court will do is determine whether the County's blanket call for a 20% minimum property "dedication" satisfies those legal standards. The same is true of the remainder of the taking and due process issues. The keys here are the factual impacts of the County's regulations on Sinclair, not on the creation of new law or the interpretation of supposedly unclear state law. Other Circuits have no such reluctance to review land use decisions that raise constitutional issues and that satisfy the actual parameters of the *Pullman* doctrine, rather than the Ninth Circuit's expansion. (E.g., *Heritage Farms, Inc. v. Solebury Tp.*, 671 F.2d 743, 747 [3d Cir. 1982].)

What the Court below called the Ninth Circuit's "consistent practice" of insulating regulatory taking cases from federal judicial scrutiny warrants this Court's examination in light of *Frank Mashuda* and its progeny.

Moreover, in reality this erroneous practice is not even consistent.[12] The upshot is chaos: land use/takings matters in the Ninth Circuit are — or are not — "sensitive areas of social policy" justifying — or not — abstention, depending on which Ninth Circuit panel decides the particular case. Having decided more land use cases than any other circuit, one might expect that the Ninth Circuit would at least have a consistently applied policy. Yet, despite the fact that the panel opinion plainly identified issues on which there was not Ninth Circuit harmony (App. A7, A8, A15), and the Petition for Rehearing noted others, no Circuit Judge even called for an *en banc* vote. Apparently this Court is the only institution to end this anarchy.

A REGULATION THAT DEMANDS A BLANKET, SPECIFIC EXACTION OF PROPERTY AS AN EXTORTIONATE CONDITION TO *ANY* TYPE OF DEVELOPMENT PERMISSION, IS FACIALLY INVALID AND RIPE FOR REVIEW UNDER THIS COURT'S DECISIONS IN *NOLLAN* AND *DOLAN*

Perhaps the clearest of the County's unconstitutional actions with respect to Sinclair's property is its inflexible, uniform requirement that, as a condition to the issuance of *any* development permission whatever, "[a]

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[12] Thus, in a number of cases, the Ninth Circuit has held quite the opposite and ruled that abstention in the supposedly "sensitive" field of land use was not justified. See, e.g., *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380 (9th Cir. 1981); *Herrington v. County of Sonoma*, 706 F.2d 938 (9th Cir. 1983); *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 579 (9th Cir 1983); *Stephens v. City of Vista*, 994 F.2d 650 (9th Cir. 1993).

minimum of 20% of the site shall be dedicated to the County or another appropriate public agency and/*or private organization* to be set aside for public use." (App. E-5; emphasis added.)[13] Beyond that, the 20% must include all of the beach and bluff area of the property — again, without regard to the nature or impact of the proposed development (App. E-5), which in fact may have no impact on such land, and hence no required nexus.

This Court has clearly laid down the law with respect to such exactions. In *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) this Court held that exactions as conditions to land development were valid only if they had a substantial nexus to the public burdens said to be caused by the proposed development. Otherwise, to borrow this Court's harsh description, such action would be an act of "out-and-out . . . extortion." (483 U.S. at 837.) Because the broad and generalized exaction in *Nollan* could not meet any defensible standard, this Court did not expand further on the nature of the required nexus.

The opportunity to complete the *Nollan* rule came a few years later, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There, this Court held that the exaction must be roughly proportional to the anticipated public burden and placed the burden of demonstrating the nexus and proportionality of the exaction on the governmental body demanding it.

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[13] While "private organizations" may (or may not) be engaged in good works, it is a breathtaking leap over the limits of the "public use" requirement of the Fifth Amendment for a county to make a brazen demand for land of one private owner so it can give it to another private owner without bothering with any of the findings of public use and necessity that the law requires.

But here, the County's demand for "a minimum of 20% of the site" as a condition for *any* development of any kind or intensity, and of any or no impact on the public, simply defies the *Nollan/Dolan* standard. At a minimum, Sinclair's challenge to it is sufficient to establish facial invalidity *prima facie*.

Because the County's regulations thus provide that this exaction will be applied as some sort of extorted "entry fee" to get the County even to consider development of the property, there is no opportunity to measure it against specific development plans. As it is an abstract, generically applied exaction, it is ripe for adjudication on its face.

ARBITRARY GOVERNMENT PROPERTY REGULATION CAN BE A SUBSTANTIVE DUE PROCESS VIOLATION EVEN IF IT DOES NOT VIOLATE THE TAKINGS CLAUSE

In *Graham v. Connor*, 490 U.S. 386 (1989) this Court decided to curb a type of constitutional over-litigation that had begun to flourish. Too many litigants were tacking on claims for substantive due process violations as "catch-all" alternatives to their more particularized constitutional claims. In *Graham*, this Court held that this practice should cease where the government activity complained about was subject to redress through one of the specific constitutional protections (there, the Fourth Amendment). Thus, if a government activity is a taking, an award of just compensation moots the other claims. But what if an arbitrary governmental act works a substantial deprivation of property, but its impact is not so

severe as to be an out-and-out taking?[14] Does the Constitution then permit the government *carte blanche*?

The Ninth Circuit has carried *Graham*'s logical concept to its illogical extreme: with respect to actions involving property, the Ninth Circuit has created a body of law that would protect against *only* the most extreme governmental actions that rise to the level of a Fifth Amendment taking. Other high-handed or arbitrary governmental treatment of property owners that deprives them of property rights receives no redress at all.

The pattern began with *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1994) (*en banc*). There, the Ninth Circuit held that a city's abuse of its inspection power to cause the vacation and forfeiture of property so it could be acquired and transferred to a favored party would violate the Fifth Amendment's prohibition against taking private property solely for the use of another private party. In that circumstance, the court held that the Fifth Amendment *would provide redress*, and therefore a substantive due process claim could not be pursued. Please note that the court held the takings claim would provide real, not just theoretical, relief.

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[14] Please recall that, to effect a taking, the regulation must deprive the property owner of all or nearly all utility or value. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1994). But that is not the end of the story. Other constitutional violations — cognizable under the due process clause — also occur, even though they do not rise to the level of takings. E.g., *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221-1223 (6th Cir. 1992); *Deblasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1995).

But as soon as *Armendariz* was on the books, the Ninth Circuit began to expand it beyond its rationale. In *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997) the court said that *Armendariz* was designed to plug a perceived "loophole" in takings/ripeness law, i.e., that plaintiffs would use the same facts to plead both due process and takings claims, recognizing that due process claims could be ripe even when takings claims were not. (110 F.3d at 1499.) Thus, by forcing *all* property deprivation claims into the *takings* pigeonhole, the Ninth Circuit has arbitrarily put a number of cases plainly deserving of judicial relief on non-takings grounds completely beyond the law's power to redress. Either these are takings cases or the government regulators can run roughshod over citizens' due process rights with impunity. That anomaly cannot comport with the Constitution.

The Ninth Circuit's *Armendariz* idea is logical, but only when the due process claim is merely an alternative way of pleading the facts giving rise to the taking claim. It may have made sense in *Macri*, for example, as there the due process claim was that the regulation failed to substantially advance a legitimate state interest (a claim this Court has repeatedly found subject to redress by the Fifth Amendment).[15]

The case at bench supplied the final nail in the coffin of owners deprived of their property rights, but not so completely as to suffer an uncompensated taking. Here, the due process claims were not merely restatements of the taking claims. Here, the *taking* claims are related to County regulations that make it impossible for Sinclair to use its property in an economically beneficial or

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[15] See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1994).

productive way. The *due process* claims, however, are based on a series of arbitrary and capricious actions by the County with respect to this property, even if they do not reach the level of takings. By now they are familiar: *first*, the County arbitrarily eliminated virtually all access to Sinclair's property and then used that as an excuse to prevent development; *second*, the County designated five of the six Sinclair parcels as "environmentally sensitive habitat" without any disclosed data or current evidence to support that designation; *third*, the County conditioned *any* development of the 40-acre remnant of Sinclair's property on the "donation" of "at least" 1/5 of the entire 265-acre property to the County or — adding insult to injury — to some unspecified "private organization" (App. E-5) without any showing of a required nexus; and *fourth*, the County based its refusal to allow development on the ground that there are supposedly archaeological sites somewhere on the property (though the County refused to identify the sites), a process that makes the Star Chamber look good, and is more reminiscent of Kafka than of American jurisprudence.

A substantive due process violation could readily be found with respect to any or all of these actions even if the trier of fact determined that the County's overall actions had not gone so far as to take all or virtually all of Sinclair's property.

FEDERAL CIRCUIT COURTS HAVE REPEATEDLY REQUESTED GUIDANCE FROM THIS COURT ON THE PARAMETERS OF SUBSTANTIVE DUE PROCESS PROTECTION FOR PROPERTY OWNERS

This Court once described substantive due process as a "treacherous field." (*Moore v. City of East Cleveland*, 431 U.S. 494, 502 [1977].) More than merely "treacherous" in the land use arena, this field is noteworthy for its lack of guideposts, leading to conflict and confusion in the lower courts, as the Courts of Appeals have noted regularly. The following observation from the Sixth Circuit is typical:

> "The circuits are in substantial disagreement on the role of the federal courts in reviewing zoning claims of this kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, it has never laid down definitive standards of review. . . . *The lack of uniformity among the circuits, in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable.*" (*Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 [6th Cir. 1992]; emphasis added.)[16]

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[16] See also *RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 914 (2d Cir. 1989) (federal courts have charted an "uneven

(continued)

Commentators have echoed these thoughts. See, e.g., Comment, *Giving Property All The Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 Cath. U.L. Rev. 703, 704 (1992) (Supreme Court opinions fail to provide "coherent guidelines" for analysis of substantive due process claims, causing lower courts to proceed with "little direct guidance" regarding whether and when arbitrary and capricious deprivations of property rights implicate substantive due process); Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?* 16 U. Dayton L. Rev. 313, 315 (1991) (survey of lower court decisions suggests Supreme Court has "failed to provide guidance" as to when substantive due process applies).

This kind of legal anarchy serves no one — least of all the courts. If nothing else, it burdens the courts with more litigation. It opens the door for courts like the one below to create rules that may be easier for them to administer (after all, it takes less effort to ship off a case to the state courts than it does to consider its merits) but that trench on the constitutional rights of citizens. And, after all, state courts have their own caseload burdens. It does not advance the cause of sound federalism for federal judges to fob off cases for which Congress explicitly created a jurisdictional spot in the federal courts under 28 U.S.C. § 1332.

Nothing about the Constitution was intended to give local agencies a "home court advantage." The idea was

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(fn. continued)
course" in explicating how substantive component of Due Process Clause protects landowners in disputes with local agencies); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (law unsettled in Eighth and other circuits as to "parameters of substantive due process in zoning cases . . .").

to protect the citizenry. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321-322 [1987].)

CONCLUSION

The court below created hopeless confusion and decisional conflict in the relationship between this Court's ripeness decision in *Williamson County*, requiring property owners to resort first to state courts to determine whether compensation for a regulatory taking will be granted, and 28 U.S.C. § 1332, permitting a citizen of another state to sue in federal court in the first instance in order to resolve state law questions against a forum state resident.

To Sinclair, the answer seems evident: *Williamson County* did not deal with 28 U.S.C. § 1332, and nothing about it requires a diverse plaintiff who sues under state law to forego its right to invoke diversity jurisdiction. That is what 28 U.S.C. § 1332 is all about. This Court's guidance is required on an issue that is central to both federal jurisdiction and regulatory taking law, and is of widespread impact.

Sinclair prays that certiorari be granted.

DATED: January 29, 1998.

Respectfully submitted,
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Sinclair Oil Corporation

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SINCLAIR OIL CORPORATION, a Wyoming Corporation,
Plaintiff-Appellant,

v.

COUNTY OF SANTA BARBARA, a Political Subdivision of the State of California; SANTA BARBARA COUNTY BOARD OF SUPERVISORS,
Defendants-Appellees.

No. 94-56611
D.C. No. CV-93-06943-RMT
OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
May 8, 1996—Pasadena, California

Filed September 16, 1996

Before: Floyd R. Gibson,* John T. Noonan, Jr., and David R. Thompson, Circuit Judges.

Opinion by Judge Gibson

*The Honorable Floyd R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

COUNSEL

Michael M. Berger, Berger & Norton, Santa Monica, California, for the plaintiff-appellant.

Paula F. Frantz, County of Santa Barbara County Counsel's Office, Santa Barbara, California; David Petit, Hedges & Caldwell, Los Angeles, California, for the defendants-appellees.

OPINION

GIBSON, Circuit Judge:

Sinclair Oil Corporation ("Sinclair"), the owner of six lots comprising 265 acres of undeveloped coastal land in Santa Barbara County, California ("the County"), filed a suit alleging primarily that the County's exercise of its regulatory pow-

ers had effected a "taking" of Sinclair's property for which "just compensation" was due under the federal and state constitutions. The district court dismissed four of Sinclair's claims as unripe for federal adjudication; the court dismissed the remaining cause of action, which sought a writ of mandate declaring the pertinent zoning actions invalid under California law, based on its belief that 28 U.S.C. § 1651, the All Writs Act, could not provide an independent basis for jurisdiction. In this appeal, Sinclair argues that its federal constitutional claims are ripe and that, even if they are not, the court should have assumed diversity jurisdiction over the state law claims. The County responds that the district court correctly determined that this suit is not ripe. In addition, assuming that any of Sinclair's claims are justiciable, the County contends that the federal courts should abstain from considering this case. We affirm in part, reverse in part, and remand with instructions.

I. BACKGROUND

Under California law, every county must adopt a "General Plan" of land use regulation. *See* Cal. Gov't Code §§ 65300-65361 (West 1996). In 1993, the County supplemented its existing General Plan by promulgating a "Community Plan" as described in Cal. Pub. Res. Code § 21083.3(e) (West 1996). When it enacted this Community Plan, which was applicable to a particular geographic region known as Goleta, the County contemporaneously approved an environmental impact report designating certain areas as environmentally sensitive habitats. Once land has been specified as an environmentally sensitive habitat, its use is significantly restricted and subject to severe limitations. *See Sierra Club v. California Coastal Comm'n*, 12 Cal. App. 4th 602, 611 (Cal. Ct. App. 1993).

Sinclair owns 265 acres of undeveloped coastal land in Santa Barbara County; this property, known as "More Mesa," is subject to the Goleta Community Plan ("the Plan"). The

Plan substantially affects Sinclair's property, as it reduced from 300 to 70 the number of homes potentially allowable on More Mesa. Furthermore, the Plan designated a large portion of the land as an environmentally sensitive habitat. The Plan did create an administrative procedure through which Sinclair could petition to develop more than 70 residences on the site. To date, though, Sinclair has not submitted to the County a proposal for development of More Mesa, and it has also failed to seek compensation from the County.

On November 17, 1993, Sinclair filed this lawsuit in the United States District Court for the Central District of California.[1] The complaint asserted that the Plan, on its face, effected a taking of Sinclair's property requiring just compensation under the California and United States Constitutions. Furthermore, citing the County's allegedly unreasonable precondemnation conduct, Sinclair sought additional compensation pursuant to both federal and state law. In addition, Sinclair claimed that the County's adoption of the Plan violated Sinclair's substantive due process rights. Finally, Sinclair asked the district court to issue a writ of mandate declaring the Plan invalid under California's statutes governing the adoption and implementation of general plans.

The County did not answer the complaint, but instead filed a motion to dismiss the suit. The district court granted the motion, labelling as unripe four of Sinclair's five causes of action. The court also dismissed the remaining claim, the petition for a writ of mandate, because it believed that the All Writs Act, 28 U.S.C. § 1651 (1994), could not provide an independent basis for federal jurisdiction. Though Sinclair,

[1]Sinclair also filed, in September of 1993, a suit in state court seeking to nullify the Plan as inconsistent with California's Environmental Quality Act and the California Coastal Act. In its state court prayer for relief, Sinclair does not request damages or "just compensation." Instead, the company merely desires a peremptory writ invalidating the Plan. Furthermore, the parties informed this Court by letter that the state litigation has been voluntarily stayed until October 24, 1996.

reminding the court that the state law causes of action were premised upon diversity jurisdiction, asked for reconsideration of the dismissal of those claims, the court refused to waver from its initial decision. Sinclair filed a timely notice of appeal from the district court's judgment.

Before this Court, Sinclair maintains the district court improperly concluded that its facial challenges to the land use regulations are not ripe for federal adjudication. The County remonstrates that the court correctly determined the claims are not yet justiciable. In the alternative, the County contends the federal courts should abstain from hearing this case.

II. DISCUSSION

A. Standard of Review

This court reviews de novo a district court's ripeness determination. *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 163 (9th Cir. 1993). In general, motions to dismiss "must be viewed with particular skepticism in cases involving claims of inverse condemnation." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1401 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

B. The Ripeness of Sinclair's Federal Constitutional Claims

[1] In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court clarified the ripeness requirements applicable to "as applied" constitutional challenges to land use regulations. Before a plaintiff can bring such a suit in federal court, he must first procure from the relevant regulatory body "a final decision regarding how [he] will be allowed to develop [his] property." *Id.* at 190. To satisfy this requirement, a California landowner must submit to local decision-makers at least one meaningful application for a development project and a variance.

Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991). Additionally, because the Fifth Amendment does not prohibit all takings, but merely takings unaccompanied by just compensation, an as applied challenge is unripe unless the plaintiff has sought "compensation through the procedures the State has provided for doing so." *Williamson County*, 473 U.S. at 194; *see also Jones Intercable v. City of Chula Vista*, 80 F.3d 320, 324 (9th Cir. 1996) (observing that a California plaintiff's federal takings claim will not ripen until the party has first sought compensation through that state's inverse condemnation proceedings).

[2] While these twin ripeness requirements are clearly applicable to all claims which, like the causes of action in *Williamson County*, raise as applied arguments under the Constitution's Takings Clause, they are not so suitable as prerequisites to other varieties of federal land use litigation. In this case, Sinclair contests the Plan's facial validity under various constitutional provisions.[2] Consequently, we will separately address the ripeness of each of these claims.

1. The facial taking claims

[3] In counts three and four of its complaint, Sinclair asserts that the Plan, on its face, constitutes a taking of the More Mesa property for which just compensation is due under the Fifth Amendment. Sinclair, though, "faces an 'uphill battle in making a facial attack on the zoning restriction as a taking.' " *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 877 (9th Cir. 1987) (quoting *Keystone*

[2]Sinclair vigorously maintains that its federal claims involve only facial challenges to the Plan, and a fair reading of the complaint supports this assertion. Indeed, due to Sinclair's failure to submit to the County any plan to develop More Mesa, the dictate of *Williamson County* would render unripe any as applied claims that the company might have raised. *See, e.g., Christensen*, 995 F.2d at 164 (applying ripeness requirements to as applied taking claim).

Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)) (alteration omitted), *cert. denied*, 488 U.S. 827 (1988). To prevail on the merits of this claim, Sinclair will be required to show that the Plan either: (1) does not substantially advance legitimate state interests; or (2) denies the company the economically viable use of its land. *Christensen*, 995 F.2d at 165.

[4] It is fairly well-settled in this Circuit that the first *Williamson County* ripeness requirement, the "finality" requirement, is not germane to facial taking claims. *See Lake Nacimiento*, 841 F.2d at 877 (addressing merits of facial challenge even though landowner had failed to satisfy the finality requirement). *But cf. Southern Pac.*, 922 F.2d at 506 n.9 (noting that this Circuit has never explicitly held the finality requirement applicable to facial taking claims, but refusing to decide the question). It is less clear, however, whether the second ripeness criterion, the "just compensation" requirement, applies to these claims. *Compare Southern Pac.*, 922 F.2d at 505-06 ("[A] claim alleging that mere enactment of a statute effects an unconstitutional taking is unripe unless and until it is known what, if any, compensation is available.") *with Christensen*, 995 F.2d at 164-65 (reaching merits of facial challenge even though the landowners had not satisfied the just compensation requirement).

[5] In *Southern Pacific*, after carefully considering our prior decisions in this area, we determined that the just compensation requirement should apply to taking cases questioning the facial validity of land use regulations. This approach seems to be consistent with both the language of the Fifth Amendment and the Supreme Court's opinion in *Williamson County*. In that case, the Court emphasized:

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore

> requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson County, 473 U.S. at 194 n.13. Thus, even if a zoning ordinance, on its face, "takes" property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner. Indeed, we have found that landowners who assert their property has been *physically* taken must first seek compensation from the state before turning to a federal forum. *Sinaloa Lake*, 882 F.2d at 1402.

Nonetheless, this Court has not uniformly applied the just compensation requirement to facial taking challenges. *See Christensen*, 995 F.2d at 164-65; *Lake Nacimiento*, 841 F.2d at 877 (considering facial taking challenge even though there is no indication that the landowner sought just compensation using state procedures). In fact, the Supreme Court has itself indicated that the extent to which a property owner is compensated is irrelevant to a facial taking analysis. *See Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

This seeming inconsistency can perhaps be best explained by analyzing the type of facial taking claim at issue in a particular case. As noted above, a regulation represents a facial taking if it either fails to substantially advance legitimate state interests *or* deprives the landowner of the economically viable use of his land. The petitioner in *Yee* proceeded solely alleging the first type of facial taking claim and asserted only that the relevant ordinance did not substantially advance a legitimate state interest. *See id.* The Supreme Court stated that this type of claim "does not depend on the extent to which [landowners] are deprived of the economic use of their . . . property or the extent to which [they] . . . are compensated . . ." *Id.* at 534; *see also Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994) (stating in dicta that a "legitimate state interest" claim does not depend on the

amount of compensation provided to the landowner). In contrast, the extent to which a landowner has been compensated *is* relevant when he maintains that a regulation has denied him the economically viable use of his land. If the local government has adequately compensated the property owner for the deprivation of use, the Fifth Amendment would not provide him any additional benefits.

[6] It appears, then, that while the just compensation ripeness requirement does not apply to "legitimate state interest" facial taking claims, it does apply to claims premised upon the denial of a property's economically viable use. Therefore, the federal facial taking claim contained in count three of Sinclair's complaint *is not* ripe, because it contends that the Plan stripped More Mesa of its economically viable use. On the other hand, the federal facial taking claim embodied in count four of Sinclair's complaint *is* ripe, as it asserts that the Plan does not substantially advance a legitimate state interest.

2. The substantive due process claim

[7] Sinclair also argues that the County's adoption of the Plan violated its substantive due process rights. In the past, we held that *Williamson County's* ripeness requirements were immaterial to a facial taking claim alleging an infringement of substantive due process rights. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.) ("Ripeness requirements are relevant only to 'as applied' [substantive due process] challenges, and not to facial challenges."), *cert. denied*, 115 S. Ct. 193 (1994). Nevertheless, in recent days we have expressly refuted the notion that substantive due process claims can apply where the government has allegedly effected a taking violative of the Fifth Amendment. *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc). In *Armendariz*, we explained that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amend-

ments have merit." *Id.* Sinclair's substantive due process claim, therefore, no longer states a valid cause of action.[3]

3. The unreasonable precondemnation delay claim

[8] We have previously acknowledged that under certain circumstances a government's precondemnation activities can give rise to a federal taking claim in favor of a property owner. *See Kaiser Dev. Co. v. City & County of Honolulu*, 913 F.2d 573, 575 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991). The courts in this Circuit have also found, though, that both *Williamson County* ripeness requirements apply to these types of claims. *See Southern Pac.*, 922 F.2d at 503-05; *Picard v. Bay Area Regional Transit Dist.*, 823 F. Supp. 1519, 1522 (N.D. Cal. 1993). As such, Sinclair's federal claim alleging unreasonable precondemnation delay is not ripe.

C. Sinclair's Taking Claims under California State Law

[9] Sinclair, a Wyoming corporation, in addition to its federal grounds for relief, sought to invoke the district court's diversity jurisdiction over various state law causes of action. The district court dismissed the state law claims after finding that they, too, were unripe. We conclude that the court's decision to summarily dispose of these claims was proper.

1. The state inverse condemnation claim

[10] In *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994) (en banc), *cert. denied*, 115 S. Ct. 1176 (1995), the California Supreme Court outlined the procedure that landowners should follow when bringing inverse condemnation suits in the state courts. Where a facial challenge to a regulation is involved, the landowner need not seek a variance from the

[3]We note that the district court should amend its order to reflect that this count is dismissed with prejudice.

ordinance or exhaust administrative remedies. *See id.* at 1051. Instead, the property owner may immediately contest the allegedly invalid regulation in a declaratory judgment suit joined with an inverse condemnation action. *Id.* When opposing a regulation as applied to a particular parcel, on the other hand, the owner must first utilize available administrative procedures before seeking recourse in the state courts. *Id.* Consequently, the ripeness of this state law claim, which may properly be viewed as a declaratory judgment action joined with a claim for inverse condemnation,[4] depends upon how the California courts would regard the regulatory challenge.

[11] Our review of the relevant authorities reveals that the courts in California have strictly construed, and vigorously enforced, the distinction between facial and as applied claims. For example, the court in *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, 259 Cal. Rptr. 132, 146-47 (Cal. Ct. App. 1989), while affirming the trial court's dismissal on the pleadings, determined that the appellants had mischaracterized their challenge to a land use plan as a facial cause of action. According to the court:

> A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties. This restraint

[4]Sinclair's fourth cause of action seeks compensation for a "taking" under the California Constitution. This may correctly be viewed as an action in inverse condemnation. Likewise, Sinclair's first cause of action for a writ of mandate may properly be deemed the declaratory judgment claim. Although the court in *Hensler* stated that a writ of mandate should normally be used in as applied, rather than facial, challenges, that case involved merely a zoning ordinance. In this suit, Sinclair contests the validity of a portion of the County's general plan. California law requires landowners to use a writ of mandate to challenge any element of a general plan. Cal. Gov't Code § 65751 (West 1996). Thus, by combining a writ of mandate with an inverse condemnation action, Sinclair apparently desires to satisfy the applicable statute as well as the procedures envisioned by relevant caselaw.

> stems from the prudent judicial policy of avoiding officious checking of the political branches of the government. The question whether an alleged unconstitutional application of a regulation may be avoided is not governed by the conclusional allegations of the complaint. Rather, it turns upon the court's appraisal of the legal effect of the regulation.

Id. at 146 (citations omitted). Under the plan at that time before the California Court of Appeal, an aggrieved individual was afforded an opportunity to demonstrate to the regulating authority that her property should not be subject to the generally applicable land use standards. *Id.* Thus, those who administered the plan had the latitude to prevent an "unconstitutional application [of the regulation] to the complaining parties," *id.*, and the appellants were constrained to oppose the plan via an as applied challenge, *id.* at 146-47.

[12] Simply put, under California law "an ordinance is safe from a facial challenge if it preserves, through a permit procedure or otherwise, some economically viable use of the property. In such a case, administrative remedies must be pursued if available because the challenge is actually an 'as-applied' one." *Del Oro Hills v. City of Oceanside*, 37 Cal. Rptr. 2d 677, 687-88 (Cal. Ct. App.), *cert. denied*, 116 S. Ct. 86 (1995). Importantly, the Plan at issue in the appeal *sub judice* provides for a procedure under which Sinclair may request to engage in more extensive development of its property. *See* Goleta Community Plan, Dev.Std. LUDS-GV-1.2 pp. 50-51 (describing method through which County might accept an "increase in the developable area" or an "increase in the number of allowable units" on More Mesa). Accordingly, the County is at liberty to prevent the unconstitutional application of the Plan to Sinclair's land. Applying California law to this diversity cause of action, as we must, we conclude that the courts of that state would adjudge this inverse condemnation claim to be an as applied challenge to the Plan. Because Sinclair has failed to pursue available administrative remedies,

the district court properly dismissed Sinclair's first and fourth causes of action as unripe.

2. The state law claim alleging unreasonable precondemnation delay

[13] Sinclair's complaint also includes a state law claim asserting unreasonable precondemnation delay. The California Supreme Court has acknowledged that a plaintiff can recover for a government's unreasonable precondemnation conduct where: "(1) the [government] acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." *Klopping v. City of Whittier*, 500 P.2d 1345, 1355 (Cal. 1972) (en banc).

[14] We believe that the California courts would find this claim, like its federal analogue, unripe because Sinclair failed to procure a final decision from the County. *Cf. Hensler*, 876 P.2d at 1048-52 (suggesting that, though the California constitution protects a somewhat broader range of property than the Fifth Amendment, the necessity of obtaining a final decision from the regulatory entity applies with equal force to claims under state law). It necessarily follows that we must affirm the district court's decision to dismiss this cause of action as unripe.

D. Abstention

To recapitulate, we have decided that the district court correctly dismissed all of Sinclair's grounds for relief except the company's federal facial taking claim to the extent it asserts the Plan does not substantially advance a legitimate state interest. We now determine that the district court should refrain from presently addressing this claim under the reason-

ing of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

[15] This Court has in multiple land use cases approved a district court's decision to employ *Pullman* abstention. *See, e.g., Sederquist v. City of Tiburon*, 590 F.2d 278 (9th Cir. 1978). *Pullman* abstention is appropriate where:

> (1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
>
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
>
> (3) The possibly determinative issue of state law is doubtful.

Pearl Inv. Co. v. City & County of San Francisco, 774 F.2d 1460, 1463 (9th Cir. 1985) (quotations omitted), *cert. denied*, 476 U.S. 1170 (1986). This case meets each of these requirements.

[16] First, this Court has consistently held that "land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). Furthermore, the second prerequisite is met because, "Given [an] opportunity, a state court might avoid the federal constitutional issues by deciding that an illegal taking under the California Constitution has occurred." *Sederquist*, 590 F.2d at 282. Certainly, if the California courts provide Sinclair just compensation for a taking under state law, it might be unnecessary to address the oil company's federal taking claim. Of course, adjudication of the state claims is not absolutely certain to obviate the need for considering

the federal constitutional issues.[5] Sinclair might, for example, object to the amount of compensation received. For *Pullman* purposes, though, it is sufficient if the state law issues might "narrow" the federal constitutional questions. *Pearl*, 774 F.2d at 1464. Resolution of the California law issues would most certainly narrow a federal court's constitutional inquiry in this case.

[17] Finally, we find that the determinative issues of state law are uncertain. To be sure, the conventional inverse condemnation claim advanced by Sinclair does not appear to be particularly extraordinary or unique, and Sinclair does not raise a novel claim of statutory interpretation. Still, the Plan itself has not yet been challenged in the state courts. In a somewhat similar case, this Court observed that a local government's enactment of land use regulations "is by nature a question turning on the peculiar facts of each case in light of the many [applicable] local and state-wide land use laws . . . ." *Sante Fe Land Improvement Co. v. City of Chula Vista*, 596 F. 2d 838, 841 (9th Cir. 1979) (quotation omitted). The court continued, "We do not claim the ability to predict whether a state court would decide that the [local government] here abused its discretion." *Id.* (quotation omitted). *But see Pearl*, 774 F.2d at 1465 (criticizing this Court's liberal approach toward *Pullman's* third requirement in land use cases, but nonetheless following that reasoning as controlling precedent).

[18] We recognize that we cannot appropriately direct the district court to refrain from exercising its jurisdiction over this litigation solely because the suit involves an inverse condemnation action. *See Pearl*, 774 F.2d at 1465 n.3. Nevertheless, it is apparent to us that this case meets the criteria for *Pullman* abstention. *See Kollsman*, 737 F.2d at 836 n.18

[5]Of course, in order to preserve these issues for federal review, Sinclair will be obliged to make an *England* reservation in state court. *See Sederquist*, 590 F.2d at 281.

("[A]bstention often will be appropriate when state land use regulations are challenged on state and federal grounds."). We therefore instruct the district court to abstain from considering Sinclair's only cause of action that is currently ripe for adjudication.[6]

III. CONCLUSION

The district court properly dismissed all of Sinclair's causes of action except for the federal taking claim to the extent it asserts the Plan does not substantially advance a legitimate state interest. Though that claim is presently justiciable, we direct the district court to utilize *Pullman* abstention to defer adjudication of the issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

[6]Because this federal taking claim is an action "at law" for just compensation, the district court should retain jurisdiction and enter a stay deferring consideration of this ground for relief until Sinclair's state law claims are definitively resolved in the California courts. *See Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1728 (1996) (concluding that federal courts can dismiss based on abstention only where the relief sought is equitable or otherwise discretionary).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 31, 1997
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

SINCLAIR OIL CORPORATION,
a Wyoming corporation,
Plaintiff-Appellant,

v.

COUNTY OF SANTA BARBARA,
a Political Subdivision of the State
of California; SANTA BARBARA
COUNTY BOARD OF SUPERVISORS,
Defendants-Appellees.

No. 94-56611
D.C. No. CV-93-06943-RMT

ORDER

Before: GIBSON,* NOONAN and THOMPSON,
Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Thompson voted to reject the suggestion for rehearing en banc, and Judges Gibson and Noonan recommended rejection.

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* The Honorable Floyd R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
MAY 1, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

SINCLAIR OIL CORPORATION,
Plaintiff,

vs.

COUNTY OF SANTA BARBARA,
et al.,
Defendants.

No. CV 93-6943-RMT (GHKx)

ORDER DISMISSING ACTION
FOR LACK OF JURISDICTION

This matter having come before the court on the motion by defendant County of Santa Barbara to dismiss for lack of jurisdiction, and the court having considered the pleadings and other documents filed herein and having determined that:

1. Plaintiff's second, third, fourth and fifth causes of action alleging that the Goleta Community Plan is unconstitutional are not ripe for adjudication, and thus, this court lacks subject matter jurisdiction over these claims, *see Southern Pacific v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990); *Lake Nacimiento Rancho Co.*

v. San Luis Obispo County, 841 F.2d 872 (9th Cir. 1987); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985); and

2. The court lacks jurisdiction over plaintiff's first cause of action since the All Writs Act, 28 U.S.C. § 1651, "does not operate to confer jurisdiction," but rather, "may be invoked by the district court only in aid of jurisdiction it already has," *Benson v. State Board of Parole and Probation*, 384 F.2d 238 (9th Cir. 1967),

IT IS ORDERED that this action shall be, and hereby is, dismissed for lack of jurisdiction.

Dated: 4/28/94

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
OCT 3, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

SINCLAIR OIL CORPORATION,
a Wyoming corporation
Plaintiff,

vs.

COUNTY OF SANTA BARBARA,
a political subdivision of the State
of California; SANTA BARBARA
COUNTY BOARD OF SUPERVISORS;
and DOES 1 through 5,
Defendants.

No. CV 93-6943-RMT (GHKx)

ORDER DENYING MOTION BY
PLAINTIFF FOR RECONSIDERATION

This matter having come before the court on the motion by plaintiff Sinclair Oil Corporation for reconsideration of this court's April 28, 1994, order dismissing plaintiff's action from for lack of subject matter jurisdiction, and the court having considered the pleadings and other documents filed herein and having determined that:

(1) Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenge makes them "ripe" for federal adjudication, *Southern Pacific Transportation Company v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990);

(2) Ripeness is more than a mere procedural question; it is determinative of jurisdiction, *Id.*;

(3) If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed, *Id.*; and

(2) Diversity of citizenship under 28 U.S.C. § 1332 is insufficient to give this court subject matter jurisdiction if the case is not ripe and, therefore, not justiciable by the federal courts,

IT IS ORDERED that the motion by plaintiff Sinclair Oil Corporation for reconsideration of this court's April 28, 1994, order dismissing plaintiff's action for lack of subject matter jurisdiction is denied.

Dated: 9/19/94

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

APPENDIX E

COUNTY OF SANTA BARBARA
GOLETA COMMUNITY PLAN

More Mesa (#34)

More Mesa is comprised of approximately 300 acres which are divided into seven parcels (APN 65-320-01,02,04,07 through 10). All parcels, except the 35.5 acre County owned open space parcel (APN 65-320-04), are currently privately owned (7/93). The Mesa encompasses a gently sloping coastal terrace bisected by two deep canyon systems which drain the majority of the terrace northward into Atascadero Creek. Surrounding land formations and uses include Atascadero Creek and residential uses to the north, steep coastal bluffs, wide sandy beaches and the Pacific Ocean to the south, estate residential to the east and mixed residential and agriculture to the west. The site contains numerous trails which receive extensive passive recreational use from hikers, cyclists, equestrians, beach users and at times by off-road vehicles.

As discussed in the 1982 LCP and in The Biological Evaluation of More Mesa (1982), the site contains a variety of habitats, which individually qualify as environmentally sensitive habitats (ESH) under LCP guidelines and were so designated during certification of the County's LCP. These include all major wetlands, oak woodlands and the roosting/nesting site(s) for the Black Shouldered Kite. In addition to these habitats, the majority of the grasslands onsite serve as both active foraging grounds and buffer areas for four sensitive species of raptors. These include the Kite, Northern Harrier, Burrowing and Short Eared Owls, along with a wide variety of other wildlife. Based upon the conclusions of this 1982 study and the endorsement of the State Department of Fish and Game and the Coastal

Commission (7/10/82), the site functions as an interrelated ecosystem with approximately 246 acres now designated with an ESH Overlay. Further, a wide variety of other wildlife utilize the site, which is part of an ecosystem of regional importance, especially given its proximity to, and interrelationship with the Atascadero Creek ecosystem (91-EIR-13).

In ord r to maintain consistency with LCP policies and to promote an environmentally sound design for the site, development standards are included which recognize that these constraints limit the development potential of the site to areas primarily located outside of designated ESH areas. Further, the intensity of such development must be consistent with the long term protection of the site's biological and aesthetic character. Given these constraints, the following development standards require that the developable area of the site be limited to approximately 40 acres at the eastern end of the site (Figure 10), and that such development be limited to about 2 units per developable acre (70 units).

Development Standards

Policy LUDS-GV-1:

With the exception of the County owned parcel (APN 65-320-04) which shall be designated Open Lands and zoned Recreation (REC), the More Mesa site (APN 65-320-01,02,07 through 10) shall be designated PD-70 and zoned PRD-70 and shall comply with the following development standards for any proposed development on the site:

DevStdLUDS-GV-1.1:

No applications for development shall be accepted prior to approval of a Specific Plan for the entire site. A Specific Plan shall be

prepared for the entire site (currently including APNs 65-320-01,02,07 through 10) which incorporates all of the conditions listed below and conforms to all other policies of the land use plan. The specific plan shall show the location of roads and structures and indicate the amount and location of open space for habitat preservation and public recreation. Any parcels within the More Mesa site purchased subsequent to the adoption of this Community Plan by the County or other public/private agencies for the purposes of resource/open space protection shall be excluded from the boundaries of the Specific Plan. All new development shall be confined to the buffer areas on the eastern side of the site indicated as being acceptable for development on Figure 10 of the Community Plan, with the exception of minor public improvements such as trails, signs and restrooms. Any high density development shall be clustered toward the north end of the developable area, with lower density development toward the south.

DevStd LUDS-GV-1.2:

Prior to accepting any increase in the developable area depicted on Figure 10, or any increase in the number of allowable units over 70 to 100, the County Resource Management Department, in consultation with the site's property owner, the State Department of Fish and Game and California Coastal Commission, shall prepare a new study on the site's biological sensitivity to review the extent of the environmentally sensitive habitat designation for the site, the extent of developable area relative to biological resources, and the site's

relative importance to the related open lands within the Atascadero Creek ecosystem. The study shall provide recommendations to protect ESH areas from the adverse effects of development, including identification of all areas that shall not be disturbed, buffer areas to protect all ESH areas from uses on the site and other appropriate methods to avoid disturbance to sensitive resources. This study shall include a recommendation on areas to be subject to development, potential numbers of units, and those areas to be preserved as permanent open space.

The property owner shall be responsible for funding the entire cost of undertaking this study, although County RMD should assist in obtaining any available grants to help offset costs. During preparation of this study, County RMD shall consult with the property owner, State Department of Fish and Game and Coastal Commission at the following stages:

1. Prior to the request for proposals and during the selection of the consultants to be retained for the preparation of the study, focusing on study scope, methodology and costs.

2. At the "kick-off" meeting for initiation of the study and at key points during the preparation of the study.

3. During the review of the administrative draft, draft and final document stages of study preparation. Public review and/or hearings on the scope of the study and its eventual findings shall be conducted.

The final document shall contain a summary of the issues raised during preparation, particularly an outline of any disagreements between experts. The results of this study shall be subject to review and approval by the County Planning Commission, Board of Supervisors and Coastal Commission.

DevStd LUDS-GV-1.3:

Concurrent with the preparation of the environmental document for the Specific Plan for residential development on the site, the applicant shall fund the preparation of a habitat protection and management plan to be prepared under the direction of RMD in consultation with appropriate agencies. This plan shall provide recommendations on methods for the long term management and enhancement of the site's open space and environmentally sensitive areas emphasizing programs to reduce or eliminate the impacts of the project on the site's ESH areas and sensitive species as identified through the environmental and development review process. Preparation of this plan shall be coordinated with and account for any similar efforts on adjacent parcels owned by public agencies or private organizations.

DevStd LUDS-GV-1.4:

A minimum of 20% of the site shall be dedicated to the County or another appropriate public agency and/or private organization to be set aside for public use. The majority of the dedicated area shall be located adjacent to and include the dry sandy beach, and shall include a minimum 100 foot undeveloped bluff top

public open space area and should also include areas adjacent to public access from the nearest public road(s).

DevStd LUDS-GV-1.5:

New development onsite shall be designed to accommodate maximum public access to the site and beach with appropriate public improvements, consistent with protection of ESH areas, maintenance of reasonable privacy for new residents of the site and retention of the open undeveloped character of the site. All access improvements shall be coordinated with those on any adjacent County owned land or trail system. Such access and improvements, to be provided by the developer(s) of the site, shall include the following:

1. A minimum of one public access road, sited and designed to minimize disruption of the site's natural features and aesthetic qualities. This road or another public road shall form the western perimeter of the developable area, in order to provide a clear delineation between future developed areas and open space.

2. Parking for a total of 300 cars, inclusive of existing parking on public roads within 100 yards of trailheads leading to the site, parking available on the new access road(s) and within a gravel/unpaved lot(s) designed to hold 100 cars. Areas of parking along new public street(s) shall be sited to minimize disruption for new residents while providing adequate space to meet the 300 car total. New Parking areas shall be dispersed into a minimum of two,

but preferably three new lots located toward the northern end of the property.

3. An informal trail system aligned as closely as possible with the existing, primary historic trails shall provide access from both the site's east and west ends, and include stairway(s) to the beach, bluff top path(s), and accommodations for pedestrians, bikers and equestrians. The primary access trail from the east shall be realigned to the western boundary of the developable area in order to provide separation between public and private uses. All trails shall be sited and designated to maintain the natural character of the trails.

4. Public restrooms, informal picnic/seating areas, bicycle racks and directional and interpretive signage as deemed appropriate by the County.

DevStd LUDS-GV-1.6:

Prior to issuance of a CDP, the applicant(s) shall file a performance security with the County sufficient to cover the cost of all public improvements and mitigations described above, and the maintenance of such improvements for a period of at least 5 years. The total amount of this performance security shall be determined by the County Public Works Department in consultation with the Parks Department and RMD.

DevStd LUDS-GV-1.7:

Development shall be clustered to minimize disruption of significant views from areas of high public use, and shall be located outside of

all designated or potential Environmentally Sensitive Habitat areas.

DevStd LUDS-GV-1.8:

All development on the site, including trails and roads, shall be sited and designed to avoid areas used for nesting and roosting by the Black-Shouldered Kites and other sensitive species as identified by the More Mesa Habitat Study.

DevStd LUDS-GV-1.9:

To the maximum extent feasible, vegetation consisting of drought tolerant native species shall be used for landscaping to screen development from public use areas and to create buffers from ESH areas. Landscaping shall be designed to complement, enhance and restore native habitats onsite. As part of this buffer, a belt of native (e.g.: oaks, sycamores, willows) and non-native trees (e.g.: Monterey Cypress, Eucalyptus) shall be planted along the perimeter of the developable area and access road.

DevStd LUDS-GV-1.10:

Natural building materials and colors compatible with the surrounding terrain shall be used on exterior surfaces of all structures, including water tanks and fences. The applicant shall submit architectural drawings of the project for review and approval by the BAR, concurrently with the submittal of grading plans to RMD.

DevStd LUDS-GV-1.11:

Emergency access for the Fire Department shall be provided between development on this site and Via Roblada.

DevStd LUDS-GV-1.12:

All development shall be sited to preserve land use compatibility between the clustered medium density development at More Mesa and the existing lower density development at adjacent Hope Ranch Park. Therefore, a landscaped buffer of a minimum of 50 feet shall be required between Hope Ranch Park and this clustered development in order to ensure required land use compatibility.